Supreme Court, U.S.
FILED

951481 JAN 3 1 1996

OFFICE OF THE CLERK

No. _____

THE UNITED STATES SUPREME COURT
OCTOBER 1995 TERM

TROY LEE CHAPA,
Petitioner

VS

JIM WELLS COUNTY and OSCAR LOPEZ,
SHERIFF, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cage Wavell
Counsel for Petitioner
800 N. Shorline, Suite 320
Corpus Christi, Texas 78401
General Office: 512/884-2075

RECEIVED
FEB - 9 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

34 pp

Questions Presented for Review

Whether the Court of Appeals correctly determined that neither a Rule 60(b) Motion to Reinstate, following an involuntary dismissal of a suit for counsel's failure to attend a scheduling hearing, which failure was the result of accident, mistake or inadvertence, nor a Rule 59(e) Motion to Reconsider, allows the Court of Appeals to consider whether the trial court's dismissal was proper.

The Fifth Circuit has departed well beyond the accepted and usual course of appellate procedure, and in doing so, has approved the trial court's action which results in an unwarranted dismissal based upon procedure that abandons any concept of serving justice.

TABLE OF CONTENTS

Questions Presented for Appeal . . ii

Table of Contents iii

Table of Authorities iv

Citation of the Opinion of the United States Court of Appeals . 1

Jurisdictional Grounds 1

Constitutional Grounds 1

Statement of The Case 2

Basis of Jurisdiction in The District Court 2

Argument 2

Appendix 10

1. U.S. Court of Appeals for the Fifth Circuit Opinion

2. U.S. District's Court Order Dismissing Case Without Prejudice

3. U.S. District's Court Order Denying Motion to Reinstate

4. U.S. District Court's Order Denying Plaintiff's Motion to Reconsider

Table of Authorities

CASES:

Carmon v. Lubrizol Corp., 17 F.3d 791, 792-793 (5th Cir. 1994) 8

Commission v. Recile, 10 F.3d 1093, 1096 (5th Cir. 1993) 8

Kamen v. Kemper Financial Services, Inc, 500 U.S. 90, 99 (1991) 8

CONSTITUTION, STATUTES, AND RULES:

Fed.R.Civ.P. 60(b) 2,5,6,7

Fed.R.Civ.P. 59(e) 2,3,7

Fed.R.Civ.P. 4 7

Citation of the Opinion Of The United States Court of Appeals

The opinion by the United States Court of Appeals for the Fifth Circuit regarding the judgment sought to be reviewed is unpublished.

Jurisdictional Grounds

1. The judgment sought to be reviewed was entered on November 2, 1995.

2. No orders seeking an extension of time to file a petition for writ of certiorari were requested.

3. 28 U.S.C. sec. 1254(1) provides the United States Supreme Court with jurisdiction to review cases in the courts of appeals after rendition of judgment by writ of certiorari granted upon petition of any party to any civil case.

Constitutional Grounds

The judgment sought to be reviewed

was based upon interpretation and application of the Federal Rules of Appellate Procedure; there are no constitutional references involved in the case.

Statement of The Case

The Court of Appeals opinion attached in the Appendix correctly states the facts.

Basis of Jurisdiction In The District Court

The subject matter jurisdiction in the district court was based upon federal question, and more specifically, the Eighth Amendment of the U.S. Constitution as enforceable through 42 USC sec. 1983.

Argument

The U.S. District Court dismissed this case for the failure to attend a pretrial hearing. Petitioner then appealed the trial court's denial of his Rule 60(b) motion (motion to reinstate)

and his Rule 59(e) motion (motion to reconsider) and in his appellate brief cited the established case law standards of accident, mistake or inadvertence. The court of appeals dismissed the appeal concluding that by using these standards in his appellate brief, the wrong issue was appealed.

Thus the sole issue for this Court's review is whether the Fifth Circuit erred by strictly construing Chapa's brief and therefore concluding that he briefed the wrong issue.

Chapa comes to this court not to complain that the rules are unfair, but to show that the Fifth Circuit did not properly apply the rules of procedure or its own rulings regarding the briefing of cases. In dismissing this case, the Fifth Circuit decided not to decide whether the appeal was even properly before it. The appellate time requirements were indeed

met, and the appeal properly briefed. The appellate argument properly addressed the substantive issue of the case: that is, whether the trial court abused its discretion in denying Chapa's Motion to Reinstate or alternatively, his Motion to Reconsider the Denial of his Motion to Reinstate.

Chapa comes to this court asking that this case be the vehicle to send a clear message to all the United States Courts of Appeals that they should not evade their appellate duties by misconstruing briefs, and dismissing cases (rather than deciding them) in unpublished opinions.

Procedural Posture

The trial court's Order Denying Plaintiff's Motion to Reinstate and Order Denying his Motion to Reconsider recited that both were denied because of Chapa's

attorney's failure to appear for a pre-trial conference and failure to contact the defendants/respondents after filing the lawsuit. Chapa's motion to reinstate was filed pursuant to Fed.R.Civ.P. 60(b) which provides that a party may have relief from a final judgment or order if the grounds therefore were "mistake, inadvertence, surprise, or excusable neglect." The motion showed the trial court that the failure to appear was the result of misfiling a notice of hearing, despite more than adequate safeguards within the attorney's office for calendaring. It also sought to show that additional contact with the defendants and discovery were superfluous, given the extensive investigation and documentation that Chapa obtained even before filing his lawsuit.

The Fifth Circuit dismissed the resulting appeal on the basis that Chapa

briefed arguments pertaining to the original dismissal rather than the denial of the Motion to Reinstate. This dismissal occurred not withstanding Chapa having appealed the correct order and identified the correct appellate issues, and not withstanding that the arguments for opposing the dismissal and the arguments in favor of the Motion to Reinstate are identical for the "mistake or inadvertence" aspect of Fed.R.Civ.P. 60(b). Despite a painfully detailed analysis of the procedural posture of the case, the Fifth Circuit's opinion turned a deaf ear to the substance of the issue.

The Fifth Circuit's opinion is a maze of assumptions that never arrives at any findings because the court ruled every possibility to decide the merits of the case an impossibility. Thus, this Court should be aware that, as mentioned, Chapa filed his Motion to Reinstate as a

Rule 60(b) motion. The Motion to Reconsider was filed as a rule 59(e) motion, which extended the notice of appeal deadlines pursuant to Fed.R.App.P. 4. The Fifth Circuit recognized this scenario and strictly construed Chapa's brief and concluded the issue was missed.

The issues on appeal were either the order denying Chapa's Motion to Reinstate or the order denying his Motion to Reconsider (or both) based upon mistake, inadvertence, surprise, or excusable neglect. These issues which were raised by both trial court orders were fully briefed.

Construction of Briefs

The error of the Fifth Circuit does not turn on the rules of construction of briefs because the proper issues were identified and briefed. However, it is helpful to note that, if there were any doubt, the rules of construction call for

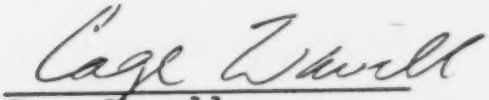
the liberal construction of briefs. In other words, the Fifth Circuit's opinion is not only technically incorrect, it is made in virtual defiance of the general rules of construction the Fifth Circuit has set for itself.

The Fifth Circuit has repeatedly held that briefs are to be construed liberally. See e.g., Carmon v. Lubrizol Corp., 17 F.3d 791, 792-793 (5th Cir. 1994); Commission v. Recile, 10 F.3d 1093, 1096 (5th Cir. 1993). While the Fifth Circuit's recitation of this rule often takes place just before finding that even a liberal construction will not save an appeal, the rule should also apply when the appeal can be preserved. This is especially the case where, as here, the brief does address the issues on appeal, and need not be "saved".

In the spirit of Kamen v. Kemper Financial Services, Inc.. 500 US 90, 99

(1991), which counsels that all issues before the Court should be decided without artificially limiting the scope of appellate review, Chapa asks that this Court reverse the Fifth Circuit's dismissal and remand to that court so that this appeal may be decided on its merits.

Respectfully Submitted,



Cage Wavell
Counsel for Petitioner
800 N. Shorline, Suite 320
Corpus Christi, Texas 78401
General Office: 512/884-2075

Appendix

1. U.S. Court of Appeals for the Fifth Circuit Opinion

2. U.S. District's Court Order Dismissing Case Without Prejudice

3. U.S. District's Court Order Denying Motion to Reinstate

4. U.S. District Court's Order Denying Plaintiff's Motion to Reconsider

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40481

TROY LEE CHAPA,

Plaintiff-Appellant,

versus

JIM WELLS COUNTY; OSCAR LOPEZ, Sheriff, Individually and in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(C-94-CV-360)

Before DAVIS, BARKSDALE and DEMOSS, Circuit Judges. PER CURIAM:[1]

---

1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basisof well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Proceeding with counsel, Troy Chapa filed a 42 U.S.C. sec. 1983 action against Jim Wells County and Jim Wells County Sheriff Oscar Lopez for monetary damages resulting from injuries, including a fractured skull, which he allegedly received when assaulted by co-inmates. The district court entered an order scheduling a pretrial conference. The docket sheet reflects that the parties were notified of the pending conference. The defendants filed an answer to Chapa's complaint.

The district court conducted the pretrial conference. The district court noted Chapa's failure to appear and failure to contact the defendants since filing the suit and granted the defendants' motion to dismiss. The district

court entered an order on February 14, 1995, dismissing Chapa's action without prejudice.

On February 17, 1995, Chapa filed a motion to reinstate his action, explaining that counsel had inadvertently misfiled the conference order and, consequently, failed to calendar the conference date. The motion explained that counsel routinely double calendared all hearings and deadlines, and that counsel had never missed a hearing or deadline in that court in 11 years of practice. The motion's certificate of service stated that the motion had been served by mail the previous day.

On March 2, 1995, the district court entered its February 28, 1995, order striking the motion to reinstate for failure to comply with local rules of form. On March 7, 1995, Chapa filed a second motion to reinstate his action.

The certificate of service reflected that Chapa had served the motion the previous day by mail. On April 10, 1995, the district court conducted a hearing on Chapa's motion to reinstate. The district court noted that counsel had not contacted the defendants since filing the suit six months before the scheduled pretrial conference and that counsel had failed to conduct discovery or develop a proposed scheduling order after filing suit. The district court denied the motion to reinstate and entered an order to that effect on April 12, 1995.

On April 17, 1995, Chapa filed a motion to reconsider reinstating his cause of action, attaching 393 pages of documents he had obtained prior to filing suit. Chapa's certificate of service reflected that he served the motion by mail on April 14, 1995. On April 19, 1995, the district court entered an order

striking the motion for failure to comply with the local rules of form. On April 21, 1995, Chapa filed and served a motion for leave to file his motion to reconsider. On May 19, 1995, the district court entered an order denying this latest motion "for the reasons originally given for dismissal of the case". On May 25, 1995, Chapa then filed his notice of appeal, stating that he was appealing the district court's order denying his motion to reinstate his appeal and the latest order denying his motion for leave to file his motion to reconsider.

OPINION

Chapa identifies as his issue the district court's alleged improper denial of his motion to reinstate his case. Yet, he actually argues whether the district court abused its discretion in involuntarily dismissing his action. The

defendants also address the involuntary dismissal as the issue for appeal. Because this appeal turns on whether Chapa is appealing from a Fed. R. Civ. P. 59(e) motion reflecting back to the underlying judgment or from a Fed. R. Civ. P. 60(b) motion, which would not reach the underlying judgment, Chapa has not argued the proper issue for appeal.

With the exception of a motion requesting correction of a clerical error, all post-judgment motions that call into question the correctness of the judgment and are served within ten days of judgment's entry are treated as Fed. R. Civ. P. 59(e) motions. Harcon Barge Rentals Co. v. D. & G Boat Rentals, Inc., 784 F.2d 665, 668-69 (5th Cir.) (en banc), cert. denied, 479 U.5. 930 (1986). If the motion is served after that time, it is a Fed. R. Civ. P. 60 (b) motion. Lavespere v. Niagara Mach. &

Tool Works, 910 F.2d 167, 173 (5th Cir. 1990), cert. denied, 114 5. Ct. 171 (1993).[2]

If a party makes a timely Rule 59(e) motion, the 30-day period for appeal runs anew from the entry disposing of that motion. Fed. R. App. P. 4(a)(4); Zapata Gulf Marine Corp. V. Puerto Rico Maritime Shipping, 925 F.2d 812, 816 n.5 (5th Cir), cert. denied, 501 U.S. 1262 (1991). However, a Rule 60 (b) motion more than ten days after the entry of judgment does not suspend the time for filing an appeal of the underlying judgment. Fed. R. App. P. 4(a)(4); Huff v. International Longshoremen's Ass'n, Local # 24, 799 F.2d 1087, 1089-90 (5th Cir.

---

2. Amended Fed.R.App.P. 4(a)(f) now states that Rule 60(b) motions suspend the time to notice an appeal if served within ten days, but this change essentially codifies Harcon Barge's holding and does not change the result.

1986). Additionally, the denial of a Rule 60(b) motion does not bring up the underlying judgment for review. In re Ta Chi Navigation (Panama) Corp. S.A., 728 F.2d 699, 703 (5th Cir. 1984). This Court "'may not treat the appeal from the ruling on the rule 60(b) motion as an appeal from the [underlying order] itself'". Aucoin v. K-Mart Apparel Fashion Corp., 943 F.2d 6, 8 (5th Cir. 1991) (citation omitted).

Any Rule 60(b) motion raising substantially similar grounds as urged, or as could have been urged, in an earlier motion is deemed successive, and any appeal based on such a motion is not reviewable by this Court. Latham v. Wells Far#o Bank, N. A., 987 F.2d 1199, 1204 (5th Cir. 1993); Burnside v. Eastern Airlines, Inc., 519 F.2d 1127, 1128 (5th Cir. 1975). The same rule is true for successive Rule 59(e) motions. Charles

L.M. v. Northeast Indep. Sch. Dist., 884 F.2d 869, 870 (5th Cir. 1989).

The district court's striking of Chapa's motions complicates the analysis of this case by affecting whether the motions are considered as either Fed. R. Civ. P. 59 (e) or Fed. R. Civ. P. 60(b) motions. Research has not disclosed any published authority on the effect of striking in this regard whether it "erases" the motion, whether it is a "disposition," or whether it merely "suspends" the motion if it is subsequently refiled. If the merits of the underlying involuntary dismissal were before this Court, it would be a close question whether the district court erred in dismissing the action. Because the suit was not filed until one month before the limitations period ran, the district court's involuntary dismissal without prejudice effectively became a dismissal

with prejudice as it was impossible to refile the suit. See Helton V. Clements, 832 F.2d 332, 334 (5th Cir. 1987) (the applicable limitations period for sec. 1983 actions brought in Texas is two years) ; McGowan v. Paulkner Concrete Pipe Co., 659 F.2d 554, 556 (5th Cir. 1981) (involuntary dismissal without prejudice is effectively with prejudice because of the running of the statute of limitations). However, this Court need not reach that issue, as the following analysis demonstrates that Chapa's appeal ultimately stems from a Rule 60(b) motion which would not have reached the underlying merits of the judgment.

Under normal circumstances, Chapa's February 17th motion to reinstate would have been considered a Rule 59 (e) motion as it was served within ten days of the February 14th dismissal. See Harcon Barge, 784 F.2d at 668-69. However, if

the striking of this motion effectively erased the motion's existence and fact of its service, then the second motion to reinstate, served 20 days after judgment, would be considered a Rule 60(b) motion. Fed. R. App. P. 4(a)(4). As the Rule 60(b) motions would not have suspended the time for filing an appeal from the underlying dismissal, and the denial of the Rule 60(b) motions would not have brought up the underlying judgment for review, See Huff, 799 F.2d at 1089-90; In re Ta Chi Navigation, 728 F.2d at 703, Chapa would have argued the wrong issue on appeal in addressing the merits of the involuntary dismissal. See Brinkmann v. Abner, 813 F.2d 744, 748 (5th Cir. 1987).

The effect would be the same if the first motion to reinstate were considered a Rule 59 (e) motion and the striking of that motion were considered a proper disposition of a Rule 59(e) motion.

Chapa's second motion to reinstate, which was served within ten days of the order striking the first motion, would then normally be considered a Rule S9(e) motion of the disposition of a previous Rule 59(e) motion, but considering the ban against successive Rule 59(e) motions, the motion would have to be considered a Rule G0(b) motion. See Charles L.M., 884 F.2d at 870.

Because the first motion to reconsider was served within ten days of the order disposing of the second motion to reinstate, it would be construed as a Rule 59(e) motion from a Rule 60(b) motion. See Fed. R. App. 4(a)(4). If the district court's striking of this motion is considered a proper disposition of a Rule 59(e) motion, then the second motion to reconsider is construed as a Rule 60(b) motion, to avoid successive Rule 59(e) motions, even though the motion was

served within ten days of the disposition of the previous motion. See Charles L.M., 884 F.2d at 870. In the end, Chapa would be appealing from the denial of a Rule 60(b) motion which would not raise the merits of the dismissal. See In re Ta Chi Navigation, 728 F.2d at 703. Again, Chapa has addressed the wrong issue on appeal. See Brinkman, 813 F.2d at 748.

However, if the district court's striking of the first motion to reinstate had no effect as to timely service, but the motion itself was construed as suspended, the service date would carry over to the filing and service of the second motion to reinstate, and the second motion would be considered a timely Rule 59(e) motion. Chapa would have then had 30 days from the date of the order denying it to file an appeal which would have raised the underlying merits of the

dismissal. See Harcon Barge, 784 F.2d at 668-69; Fed. R. App. P. 4(a)(4). Instead, Chapa filed and served a motion to reconsider within ten days of the order denying his motion to reinstate. Because this motion to reconsider merely argued another ground of the district court's dismissal and requested the same relief as the previous motion to reinstate, it is deemed to have raised substantially similar grounds as his motion to reinstate and would be considered a successive 59(e) motion, which is not allowed. See Charles L.M., 884 F.2d at 870. Therefore, the motion to reconsider would have to be construed as a Rule 60(b) motion. See id.

Even without considering the effect of the striking of the motion to reconsider during its first filing, Chapa's May 25th notice of appeal would have been timely only to the denial of the Rule

60(b) motion to reconsider, and Chapa is precluded from questioning the merit of the underlying dismissal of his case. Chapa would be considered not to have addressed the proper issue on appeal in addressing the merits of the involuntary dismissal rather than any error in the district court's denial of Chapa's Rule 60(b) motion. Brinkmann, 813 F.2d at 748. This Court will not address Chapa's issue on appeal, and the appeal should be dismissed as frivolous.[3] DISMISSED

---

3. Even if the merits of the denial of Chapa's Rule 60(b) motion were before this Court, Chapa would have had to demonstrate, not that the reinstatement of his action might have been permissible, or even unwarranted, but that the district court's denial to reinstate must have been so unwarranted as to constitute an abuse of discretion. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). The district court dismissed the action, not only because of counsel's failure to appear at a pretrial conference, but because counsel had failed to take any further action in the case after filing it. Although the involuntary dismissal may have been harsh because it resulted in a dismissal with prejudice,

---

...Continued...

there is nothing to indicate that the district court's action was unwarranted under the circumstances. See id.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TROY LEE CHAPA	)(	
	)(	
V.	)(	
	)(	C.A. NO. C-94-360
	)(	
JIM WELLS COUNTY,	)(	
AND JIM WELL COUNTY	)(	
SHERIFF OSCAR	)(	
LOPEZ,in his official	)(	
and individual	)(	
capacities	)(	

ORDER DISMISSING CASE WITHOUT PREJUDICE

Plaintiff has failed to contact the defendants pursuant to Rules 16,26 and specific order of this Court. Furthermore, plaintiff failed to appear for an initial pretrial conference scheduled for February 6, 1995 at 2:00 p.m. Accordingly, the Court hereby dismisses this case without prejudice.

ORDERED this 12 day of February, 1995.

_____/s/_____
H. W. Head, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TROY LEE CHAPA	)(	
	)(	
V.	)(	
	)(	C.A. NO. C-94-360
	)(	
JIM WELLS COUNTY,	)(	
AND JIM WELL COUNTY	)(	
SHERIFF OSCAR	)(	
LOPEZ,in his official	)(	
and individual	)(	
capacities	)(	

ORDER DENYING MOTION TO REINSTATE

After failure of plaintiff's lawyer to attend a Rule 16 conference, this case was dismissed. Plaintiff moved for reinstatement on the grounds that his failure to attend and pursue the case was an inadvertent failure to calendar. At the time of the dismissal of the case, the failure to attend, although significant, was only one of the reasons given to dismiss the case.

Defendant answered in September 1994, but after that, plaintiff's counsel did

nothing to pursue the litigation. There was no contact between plaintiff and defendant. Contrary to the Court's pretrial orders, the plaintiff did not meet with defendant to give or obtain disclosures, to develop discovery schedules, to develop a case management plan, to confer on the Court's proposed scheduling order, or in any way to advance this case on the docket of the Court.

From these facts, it is fair to conclude that the plaintiff could not have had a serious interest in advancing the case, and the motion to reinstate is denied.

ORDERED this 10 day of April, 1995.

/s/
H. W. Head, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TROY LEE CHAPA	)(	
	)(	
V.	)(	
	)(	C.A. NO. C-94-360
	)(	
JIM WELLS COUNTY,	)(	
AND JIM WELL COUNTY	)(	
SHERIFF OSCAR	)(	
LOPEZ,in his official	)(	
and individual	)(	
capacities	)(	

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

ON THIS THE 17 DAY OF May, 1995, came on to be heard Plaintiff's Motion For Leave To File His Motion To Reconsider and the Court having considered such motion does hereby deny it.

The Court denies plaintiff's motion to reconsider for the reasons originally given for dismissal of this case.

Signed this the 17 day of May, 1996.

/s/
H. W. Head, Jr.
UNITED STATES DISTRICT JUDGE

95-1481

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October-Term, 1995

TROY LEE CHAPA,

Petitioner,

v.

JIM WELLS COUNTY and OSCAR LOPEZ, SHERIFF, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Respondents.

On Reply To Petition For Writ of Certiorari To The United States Court of Appeal For The Fifth Circuit

RESPONDENTS' REPLY AND BRIEF IN OPPOSITION TO TROY LEE CHAPA'S PETITION FOR WRIT OF CERTIORARI

J. G. ADAMI, JR.
Counsel of Record
WARBURTON, ADAMI, McNEILL, PAISLEY & McGUIRE, P.C.
P. O. Box 331
Alice, Texas 78333-0331
Telephone: (512) 668-8101
Telecopier: (512) 668-8106

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether Troy Chapa filed timely Notice of Appeal under either Rule 59(e), which would allow a review of the merits of the District Court's involuntary dismissal, or under Rule 60(b), which would only allow the Fifth Circuit to address error in denial of the 60(b) motion.

The Fifth Circuit's detailed analysis conclusively demonstrates that whether Troy Chapa's post dismissal motions are construed as Rule 59(e) or Rule 60(b) motions, Chapa has still failed to file timely notice of appeal of the District Court's involuntary dismissal.

TABLE OF CONTENTS

Counter-Statement of the Questions Presented for Review i

Table of Contents ii

Table of Authorities ..... iii-iv

Counter-Statement of the Case 1-2

Reasons for Denial of the Writ 2

1. Procedural Background 2-3

2. Analysis of Procedural Facts and Application of Procedural Rules 3-5

3. Argument 5-6

TABLE OF AUTHORITIES

CASES:

Harcon Barge Rentals Co. v.
D. & G. Boat Rentals, Inc.,
784 F. 2d. 665 (5th Cir.)
(en banc), cert. denied,
479 U.S. 930, 1986 2

Zapata Gulf Marine Corp. v.
Puerto Rico Maritime Shipping,
925 F. 2d. 812 (5th Cir.),
cert. denied,501 U.S. 1262
(1991) 3

Huff v. International
Longshoremen's Assn., Local #24,
799 F.2d. 1087,
(5th Cir., 1986) 3

In Re Ta Chi Navigation
(Panama) Corp., S.A.,
728 F. 2d. 699,
(5th Cir., 1984) 3,6

Aucoin v. K-Mart Apparel
Fashion Corp.,
943 F. 2d. 6,
(5th Cir., 1991) 3,6

Lavespere v. Niagare Mach. & Tool Works, 910 F. 2d. 167, (5th Cir., 1990), cert. denied,114 5 Ct. 171 (1993) 6

Seven Elves, Inc. v. Eskenazi, 635 F. 2d. 396, (5th Cir., 1981) 6

CONSTITUTION, STATUTES AND RULES:

Fed. R. Civ. P. 59 (e) 2,4,5

Fed. R. Civ. P. 60 (b) 3,4,5,6

Fed. R. App. P. 4 (a) (4) 3

COUNTER-STATEMENT OF THE CASE

As indicated in Petitioner's brief, the Court of Appeals' opinion attached in the Appendix of Petitioner's brief correctly states the facts in this case. Since this case is conclusively determined on a procedural issue, it is important that the sequential filing of Petitioner's post-dismissal motions be restated here.

On February 14, 1995, the District Court, noting Chapa's failure to appear at a pre-trial conference and failure to contact Defendants since filing the suit, entered an order dismissing Chapa's action without prejudice.

On February 17, 1995, Chapa filed a motion to reinstate his action citing the inadvertence of his counsel to calendar and attend the pre-trial hearing. This motion was struck by the District Court's February 28, 1995 order for failure to comply with local rules. Chapa filed a second motion to reinstate on March 7, 1995.

On April 10, 1995, a hearing was held by the District Court on Chapa's motion to reinstate. An order was entered on April 12, 1995 by the District Court, denying Chapa's motion to reinstate for the reasons stated therein.

On April 17, 1995, Chapa filed a motion to reconsider reinstatement of his cause of action. This motion was struck by order of April 19, 1995 for failure to comply with the local rules of form. On April 21, 1995, Chapa filed a motion for leave to file the motion to reconsider reinstatement. The motion to reconsider was denied by order dated May 19, 1995.

Chapa filed his notice of appeal on May 25, 1995.

REASONS FOR DENIAL OF THE WRIT

1.

PROCEDURAL BACKGROUND

As indicated by the opinion of the Fifth Circuit, the sole issue is whether Chapa's May 25, 1995 notice of appeal was timely. The Fifth Circuit proceeds in their opinion to analyze every possible scenario presented by the sequential post-dismissal filing of motions by Chapa. As stated by the Fifth Circuit, this analysis is somewhat complicated by the District Court's striking of Chapa's very first post-dismissal motion requesting reinstatement, which was filed on February 17, 1995, subsequent to the order of involuntary dismissal entered by the District Court on February 12, 1995.

After involuntary dismissal of his cause of action, if Chapa desired to question the February 12, 1995 ruling of the District Court, it was necessary that he file a Rule 59(e) motion under the Federal Rules of Civil Procedure. Such a motion must be served within ten days of the entry of the judgment. Harcon Barge Rental Co. v. D. & G. Boat Rentals, Inc., 784 F. 2d 665 (5th Circuit) (en banc), cert. denied, 479 U.S. 930 (1986). Such a motion would toll the running of the 30-day period for filing notice of appeal until 30 days from the entry of an order disposing of that motion. Fed. R. App. P. 4 (a)(4); Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping, 925 F. 2d. 812, 816 n. 5 (5th Cir.), cert. denied, 501 U.S. 1262 (1991).

A motion filed after the initial ten day post-judgment period is a Fed. R. Civ. P. 60(b) motion. Such a motion does not suspend the thirty day appeal period. Fed. R. App. P. 4 (a)(4); Huff v. International Longshoremen's Assn. Local #24, 799 F. 2d. 1087, 1089-90 (5th Cir. 1986). Furthermore, as stated in the opinion of the Fifth Circuit in this case;

> "...the denial of a Rule 60(b) motion does not bring up the underlying judgment for review. In Re Ta Chi Navigation (Panama) Corp. S.A., 728 F. 2d. 699, 703 (5th Cir. 1984). This Court 'may not treat the appeal from the ruling on the Rule 60(b) motion as an appeal from the [underlying order] itself.' Aucoin v. K-Mart Apparel Fashion Corp., 943 F. 2d. 6, 8 (5th Cir. 1991) (citation omitted)."

2.

ANALYSIS OF PROCEDRAL FACTS AND APPLICATION OF PROCEDURAL RULES

In their analysis of all of the possibilities presented by the facts concerning Chapa's sequential filing of post-judgment motions, the Fifth Circuit identifies three logical possibilities of the effect the District Court's striking of Chapa's first

motion to reinstate presents. [1]

First, it can be construed that the striking of the motion by the District Court "erases" the motion and its service all together. If such is the case, Chapa's second motion to reinstate filed March 7, 1995 would necessarily be a Rule 60(b) motion, as it was filed and served outside the ten day period required by Rule 59(e). Denial of such motion fails to raise the underlying merits of the judgment on appeal or toll the 30-day appeal period. To raise such an appeal, Chapa would necessarily have had to file Notice of Appeal by March 16, 1995, within thirty days after the Court's entry of the involuntary dismissal.

Second, if the District Court's striking of the first motion to reconsider serves as a "disposition" of that motion, to question the merits of the order of involuntary dismissal, Chapa would have had to file his notice of appeal by April 1, 1995, within 30 days from the March 2, 1995 entry of the District Court's order striking Chapa's first motion to reinstate.

Lastly, if the service of Chapa's first motion to reinstate within ten days of the February 14, 1995 entry of the District Court's involuntary order of dismissal "suspends" the motion if it is subsequently refiled, then the analysis is the same as if the motion had never been struck. It is a timely filed and

---

[1]Of course, if the District Court had not struck Chapa's first motion to reconsider, it would have been clearly characterized as a 59(e) motion, and given that it was in substance disposed of on April 12, 1995, Chapa's deadline for appeal would have been May 12, 1995. His May 25, 1995 Notice of Appeal would be too late to raise the issue of the April 12, 1995 involuntary dismissal to the appeals court.

served Rule 59(e) motion that was disposed of by the Court by order dated April 12, 1995, setting the deadline for appeal at May 12, 1995.

Chapa's May 25, 1995 filing of his notice of appeal misses the deadline in all three of these possibilities. All motions filed after Chapa's first motion to reconsider filed February 17, 1995 (clearly a Rule 59(e) motion) and Chapa's second motion to reconsider filed March 7, 1995 (possibly a Rule 59(e) motion) were filed and served outside of the ten day post judgment period and must necessarily be construed as 60(b) motions, disposition of which fail to toll the running of the 30-day period for appeal or bring the merits of the underlying judgment before the appeals court. Lavespere v. Niagara Mach. & Tool Works, 910 F. 2d. 167 (5th Cir. 1990), cert. denied, 114 5. Ct. 171 (1993). See also In Re Ta Chi Navigation (Panama) Corp. S.A., and Aucoin v. K-Mart Apparel Fashion Corp..

3.

ARGUMENT

Without ever addressing any of the issues set out above, Chapa in his brief makes the conclusory and unsupported statement that "the appellate time requirements were indeed met". In the previous sentence, Chapa makes the entirely erroneous statement that "In dismissing this case, the Fifth Circuit decided not to decide whether the appeal was even properly before it". On the contrary, the Fifth Circuit conclusively decided that on the basis of the foregoing analysis, the appeal was not properly before it, and therefore dismissed it as frivolous.

The Fifth Circuit indicated in dictum that even if the merits of the denial of Chapa's Rule 60(b) motion were before the court (which is the point the Fifth Circuit seems to indicate should have been addressed by Chapa in his brief), that they find nothing in the record "so unwarranted as to constitute an abuse of discretion", citing Seven Elves, Inc. v. Eskenazi, 635 F. 2d. 396, 402 (5th Cir. 1981). Chapa erroneously takes this to indicate that the decision of the Fifth Circuit turns on whether the proper issue was briefed by Chapa, rather than the detailed analysis set forth in the Court's opinion and reiterated herein.

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully request that the dismissal of the appeal by the Fifth Circuit Court of Appeals be undisturbed and that Chapa's Application For Writ of Certiorari be denied.

Respectfully submitted,

J. G. Adami, Jr.
Counsel of Record
WARBURTON, ADAMI, McNEILL,
PAISLEY & McGUIRE, P.C.
P. O. Box 331
Alice, Texas 78333-0331
Telephone: (512) 668-8101
Telecopier: (512) 668-8106

Attorneys for Respondents
Jim Wells County and Oscar
Lopez, Sheriff, Individually and
Official Capacity